

RESERVED
Court No. 1

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

T.A. No. 38 of 2012

Tuesday, this the 14th day of August, 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Subhash Chandra Singh (JC-207720M Ex. Subedar/Supervisor Barrack and Stores Grade II) S/o Shri Nandji Singh, R/o 5/31, EWS Type- II Pritamnagar, Allahabad.

.... Petitioner

Ld. Counsel for the: Shri Yash Pal Singh, Advocate.
Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence, New Delhi.
2. Chief of the Army Staff, Army Headquarters, DHQ, PO New Delhi.
3. Chief Engineer, Central Command, Lucknow.
4. General Officer Commanding U.P. Area, Bareilly.
5. Commander Works Engineer, Lucknow.

....Respondents

Ld. Counsel for the : Shri Md Zafar Khan, Advocate.
Respondents.

ORDER

“(Per Justice SVS Rathore, Member (J))”

1. Originally Writ Petition No. 355 (SB) of 1999 was filed by the petitioner before the Hon'ble High Court Allahabad, Lucknow Bench, Lucknow and vide order dated 22.05.2012 the same was

transferred to this Tribunal and has been registered as T.A. No. 38 of 2012.

2. At the time of filing of the writ petition, on 12.03.1999 an interim order was passed by the Division Bench of Hon'ble High Court, which reads as under :-

“Hon. R.H. Zaidi, J.
Hon. Pradeep Kant, J.

Sri Sharad Kumar Srivastava has accepted notice on behalf of respondents. He prays for and is granted three weeks' time to file a counter affidavit. The petitioner may file rejoinder affidavit. List in the week commencing 19.04.99. Till then the petitioner will be entitled to his full pension, however, the same shall be subject to result of this writ petition.

12.3.99

Sd/- Hon. R.H. Zaidi, J.
Sd/- Hon. Pradeep Kant, J.”

3. In brief the facts of the case are that the petitioner was enrolled in the Army on 10.01.1969. Thereafter he served Army at various stations. The work and conduct of the petitioner was all along above average. Before the promotion of the petitioner as Naib Subedar S.K.I. to Subedar B.S. II was formally ordered, effort was made to transfer the petitioner from Kanpur after approval of his promotion. However, these efforts were proved futile but the matter was again taken up by MES authorities for transfer of petitioner from Kanpur. Therefore, petitioner preferred a representation on 27.09.1994 to the effect that in view of his retirement on 31.01.1997 he be allowed to continue at Kanpur. However, the request of the petitioner was rejected

and he was transferred from CWE Kanpur to GE 970 Engineer Works Section on 24.05.1995. Petitioner submitted an application dated 29.06.1995 and requested for re-consideration of his case. Though the petitioner was interviewed by the Chief Engineer, Lucknow Zone, who assured him that his case will be recommended and forwarded but it was rejected on 21.09.1995. Therefore, the petitioner preferred statutory complaint on 09.10.1995. Petitioner was informed on 12.01.1996 that his transfer to 970 Engineer Works section was cancelled and accordingly the petitioner continued to serve at CWE Kanpur. However, merely 15 days after cancellation of his earlier transfer order, the petitioner was informed that he has been transferred to CWE Lucknow vide letter No.4907802320CA9 dated 18.01.1996. As per the averments of the petitioner the order dated 18.01.1996 transferring him from Kanpur to Lucknow was in clear violation of Para- 5(a)(viii) of ROI 2/92 and it was apparently malafide and motivated to harass the petitioner and to frustrate his plan to settle down at Kanpur after his retirement. Therefore, the petitioner submitted another statutory complaint on 01.02.1996 and requested for cancellation of his transfer to CWE Lucknow. Before statutory complaint could have been disposed of the movement order dated 09.02.1996 was issued by CWE Kanpur for proceeding him on transfer to CWE Lucknow but no railway warrant was issued to him. Thereafter the

petitioner filed Writ Petition No. 5814 of 1996 before the Hon'ble High Court of Allahabad challenging his transfer. The said writ petition was finally disposed of by the Hon'ble High Court vide order dated 14.02.1996 and direction was given to take appropriate decision on the statutory complaint/ representation of the petitioner expeditiously. Thereafter the petitioner was declared deserter w.e.f. 09.02.1996. The case of petitioner was that he was living at Kanpur and attending the office of CWE Kanpur regularly. Petitioner was advised by CWE Lucknow vide letter dated 16.05.1996 to join his duty in his own interest immediately as pendency of the statutory complaint does not entitle the petitioner not to join the duty. Petitioner requested the CWE Kanpur to issue the railway warrant but it was refused, therefore, he sent a telegram on 22.06.1996 to CWE Lucknow and informed him that pending issue of railway warrant it was not possible for the petitioner to move and join at CWE Lucknow. Ultimately the railway warrant was given on 08.07.1996. Accordingly, petitioner moved on transfer and reported his arrival to the CWE Lucknow on 09.07.1996. Petitioner could not move earlier as no decision was communicated to him on his statutory complaint as well as no warrant was issued. Therefore, the respondents committed mistake in treating him absent from duty and subsequently declaring him deserter. Thereafter the

petitioner was tried by the General Court Martial for the following charges :-

“ CHARGE SHEET ”

The accused, Shri Subash Chandra Singh formerly JC-207720M Sub Subhash Chandra Singh, attached to Headquarters Commander Works Engineers Lucknow, and liable to trial by Court Martial under Sec 123 of the Army Act, is charged with

First Charge AN OMISSION PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE,
Army Act
Section 63

In that he,

At Kanpur, on 09 Feb 96, when ordered by MES No 400555 Shri BM Kolhi, Commander Works Engineer, Kanpur, vide Movement Order No 11160/219/E1C (i) dated 09 Feb 96, to proceed on posting to HQ Commander Works Engineer, Lucknow, after availing 03 days joining time and journey period, improperly omitted to do so.

Second Charge ABSENTING HIMSELF WITHOUT LEAVE,
Army Act
Section 39(a)

in that he,

At Lucknow, having been ordered by Commander Works Engineer, Kanpur vide Movement Order No 11160/219/E1C(i) dated 09 Feb 96, to proceed on posting after availing 06 days joining time and journey period, to HQ Headquarter Works Engineer, Lucknow did not join at the said HQ on 17 Feb 96, but absented himself without leave until 09 Jul 96.

(N Bhushan)
Col

Dated: 29 Mar 97
Place: Lucknow

Commanding Officer
Commander Works Engineers

To be tried by General Court Martial

Place: Bareilly
Dated: 19 Apr 97

Sd/- illegible
Major General
General Officer Commanding
Uttar Pradesh Area”

4. In the counter affidavit it has been pleaded on behalf of the respondents that the mere pendency of the statutory petition does not entitle the petitioner not to join the duty at his new place of posting. It is further pleaded that the plea of the petitioner that he could not move on transfer because of

non-issuance of railway warrant is not correct as the petitioner himself did not take railway warrant from the office and instead he preferred to move the Court and higher authorities. The letter issued by the Commander Works Engineers, Kanpur is annexed as Annexure No.1 to the counter affidavit. It is also pleaded that initially tentative charges were framed against the petitioner under Sections 39(a) and 63 of the Army Act for recording summary of evidence and the same was communicated to the petitioner vide letter dated 15.07.1996. After finalisation of summary of evidence the charges were framed against the petitioner but he applied for 60 days annual leave for the year 1996, which could not be granted at a stretch as his presence at Lucknow was essential, as the petitioner was involved in a disciplinary case. Vide letter dated 16.08.1996 this fact was communicated to the petitioner. However, petitioner availed 49 days annual leave and 30 days' casual leave for the year 1996 and 8 days' casual leave of 1997 in piecemeal. Petitioner was intimated regarding GCM vide letter dated 22.03.1997 and he was further asked to give the name of defending officer and defence counsel. The GCM had tried the petitioner for the offence under Sections 39(a) and 63 of the Army Act and the GCM after recording the evidence held the petitioner guilty of both the charges and punishment of forfeiture of 08 years of past service for the purpose of

pension was passed against the petitioner. Feeling aggrieved thereby the instant petition was filed.

5. The submission of the learned counsel for the petitioner is that he does not intend to challenge the GCM proceedings and only on humanitarian grounds he has argued that the sentence be modified. It is also submitted that the petitioner is receiving full pension in pursuance of the interim order passed by the Hon'ble High Court and now after lapse of about 20 years, if pension of the petitioner is reduced and recovered then it will not only adversely affect the petitioner but also his entire family. The petitioner is not in a position to refund the amount of excess payment of pension. It is submitted that on humanitarian grounds the recovery of the excess pension already paid to the petitioner be stayed and the period of punishment of 08 years forfeiture of service for the purpose of pension be also reduced rationally. Learned counsel for the petitioner has further argued that the petitioner is not getting salary for the period during which he remained absent.

6. On behalf of the respondents it is argued that the petitioner has deliberately not obeyed the movement order and has taken false grounds for not joining at the place of posting in compliance of his movement order, therefore, he is not entitled to any relief. It has also been argued that keeping in view the highest degree of discipline of the Army, the interference in the transfer and posting orders is

impermissible and therefore even after establishment of the Armed Forces Tribunals, the Tribunals have not been vested with the jurisdiction to interfere with the transfer and posting orders.

7. Learned counsel for the respondents also argued that the petitioner is not entitled for calculation of the period of his absence as qualifying service for the purpose of payment of pension nor he is entitled to wages for the period of his absence on the principle of "no work no pay".

8. Before proceeding further, we would like to deal with the legal position regarding the recovery from pension. In this regard we may take note of the judgment of the Hon'ble Supreme Court in **Ram Dayal Rai vs. Jharkhand State Electricity Board and another**, reported in (2005) 3 Supreme Court Case 501. Para- 17 of the aforementioned judgment is reproduced as under :-

"We are, therefore, of the opinion that the impugned order does call for interference by this Court and modification of the same in order to meet the ends of justice. The occupation of the quarters after 1-11-1999 is illegal. When a question was put, the learned counsel appearing for the appellant submitted that he was paying the monthly rent of Rs 25. Justice would be amply met if we direct the appellant to pay a sum of Rs 500 per month for the entire period of illegal occupation (from 1-11-1999 to 6-1-2000). The balance of convenience and the prima facie case is also in favour of the appellant. If the pensioner's benefits is cut at 5% out of the total amount of pension payable to the appellant, the appellant will suffer an irreparable loss and injury since, after retirement, the pensionary benefit is the only amount available to eke out a

livelihood for the retired employees of the Government.

9. Keeping in view the aforementioned legal position we are of the view that on humanitarian grounds and keeping in view the interim order of the Hon'ble High Court we consider it appropriate and just to protect the petitioner from the recovery of the extra amount already paid towards pension to the petitioner. Therefore, no recovery of extra payment of pension shall be made by the respondents.

10. So far as the punishment of forfeiture of 08 years of pensionable service is concerned we are also of the view that the sentence was disproportionate to the mistake as the petitioner was also seeking legal remedy during that period. Apart from it, imposition of such punishment cumulatively proves to be a very harsh punishment in the long run. Therefore, we are inclined to reduce the punishment of forfeiture of 08 years of service to forfeiture of service for 04 years of service.

11. In view of the discussions made above, this T.A. deserves to be partly allowed and is hereby **partly allowed**. The finding of the GCM is hereby confirmed. The punishment of forfeiture of 08 years of service for calculation of pension is hereby reduced to 04 years. The respondents are directed not to make any recovery of the excess amount paid to the petitioner in pursuance of the interim order of the Hon'ble High Court.

12. The pension of the petitioner shall be recalculated by forfeiting 04 years of pensionable service within four months from the date of this order and accordingly it shall be paid to the petitioner in future. It is hereby made clear that in case time is taken in calculating the pension now payable to the petitioner and in the meanwhile full pension is paid to the petitioner then the respondents shall be at liberty to recover the said excess amount from the date of this order till the date the revised pension is paid to the petitioner.

No order as to costs.

13. Office is directed to provide copy of this order to the learned counsel for the respondents for onwards transmission to ensure compliance.

(Air Marshal BBP Sinha)
Member (A)

Dated: August 14, 2018

JPT

(Justice SVS Rathore)
Member (J)

